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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1181

RICHARD BATTERTON, ET AL.,

Petitioners,

v.

ROBERT FRANCIS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondent, Robert Francis, respectfully opposes petitioner Richard A. Batterton's petition for a writ of certiorari to review the per curiam opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED

Is a substantial question of federal law presented in this case?

Does 45 C.F.R. §233.100(a)(1)(ii), as amended, which gives the states broad discretion in determining eligibility for welfare benefits for the children of unemployed fathers, conflict with the requirements of 42 U.S.C. §607(a)?

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STATEMENT OF THE CASE

To avoid unnecessary repetition, respondents accept petitioners' Statement of the Case.

ARGUMENT

I.

The decisions below have an extremely minimal impact on the administration of state welfare programs.

The courts below held that the regulation promulgated by the Secretary of Health, Education, and Welfare in July 1973, 45 C.F.R. §233.100 (a)(1), was in conflict with the Social Security Act and was thus invalid. While the effect of this holding was to nullify the Maryland regulation, MARR 7.02.09 Sec. 10.A(2) (formerly Rule 200 X.A.2), which excludes from AFDC-UF coverage those children of fathers who are on strike or who are otherwise disqualified from unemployment insurance, the impact of the decisions outside Maryland is insubstantial. According to the information supplied by H.E.W. to the district court, only 23 states, including Maryland, participate in the optional AFDC-UF program. Of this number, five states impose eligibility conditions on strikers, and Maryland is the only state which disqualifies unemployed fathers who are ineligible for unemployment insurance. See Francis v. Davidson, 340 F.Supp. 351, 363 n.22 (D.Md. 1972) (hereinafter cited as Francis I) (App. 19a). The invalidation of the H.E.W. regulation therefore has no substantial effect outside the State of Maryland.

II.

There is no conflict of decisions among the circuits.

Petitioners have cited no cases from other circuits which conflict with the decisions in the courts below. Indeed, given the limited number of jurisdictions which impose eligibility criteria similar to those of Maryland's AFDC-UF program, it is not surprising that no other courts have dealt with the narrow question raised in this case. The decisions below thus constitute an

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uncontradicted body of law which does not invite this Court's resolution or review.

III.

In summarily affirming the decision in Francis I, this Court has recognized the insubstantiality of the question presented in this litigation.

In Francis I, the district court enjoined the Maryland AFDC-UF regulation as violative of the federal regulation as written prior to 1973 (App. 54a). Maryland appealed that decision to this Court, which summarily affirmed, 409 U.S. 904 (1972) (App. 61a). While the subsequent litigation involves the validity of the amended H.E.W. regulation in light of the requirements of the federal statute, 42 U.S.C. §607(a), Bethea v. Mason, 384 F.Supp. 1274 (D. Md. 1974) (hereinafter cited as Bethea) (App. 86a), and Francis II (App. 79a), aff'd ___ F.2d ___ (4th Cir. Sept. 22, 1975) (App. 100a), in substance the importance of the federal question has remained the same throughout the history of this case. That question relates to the ability of the states to exclude from AFDC-UF coverage those children of fathers who are out of work due to labor disputes or who are otherwise disqualified from receiving unemployment. In affirming the Francis I decision without opinion, this Court tacitly agreed that the issue did not warrant plenary review. Nothing further has developed in the four years since that decision which would raise the question to the level of importance which would justify granting the writ.

IV.

Since the Secretary of H.E.W. has proposed a new regulation to conform to the holding of Francis II, review by this Court is not warranted at this time.

On August 8, 1975, H.E.W. proposed amendments to 45 C.F.R. §233.100(a)(1), the regulation which was invalidated by the Francis II decision. See 40 Fed. Reg. 33461 (App. 121a). This proposal eliminates any language which would allow the states the option of excluding fathers out of work due to circumstances which would disqualify them from unemployment insurance but requires the exclusion of strikers who would be, or who are disqualified from

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unemployment compensation under state law. If adopted, this amendment dramatically alters the posture of this case. As petitioners admit, the regulation would allow AFDC-UF payments to two classes of respondents: those fathers who are unemployed by virtue of misconduct and those who have voluntarily quit their jobs (Petition at p. 15). In addition, the regulation constitutes a significant change with regard to strikers, who, under the proposed amendment, are mandatorily excluded from AFDC-UF coverage, where they were formerly excluded at the option of the states. See 45 C.F.R. §233.100(a)(1). In view of the possible administrative adoption of this new regulation, this Court should decline to accept review to await the decision of the Secretary. Compare Richardson v. Wright, 405 U.S. 208 (1972). Indeed, prior to this Court's refusal to grant plenary review to Francis I, H.E.W. was similarly in the process of adopting a regulation, amending 45 C.F.R. §233.100(a)(1) as then written. In view of the pending revision, the Solicitor General recommended that this Court deny review at that time. See Memorandum for the United States/Amicus Curiae as Curiae, Davidson v. Francis and Chamber of Commerce of the United States v. Francis, August 1972 (App. 56a).

V.

The Decisions Below are Clearly Correct

A. Since the regulation allows the states to exclude from AFDC-UF coverage fathers who are clearly unemployed, it conflicts with the requirements of 42 U.S.C. §607(a).

Section 407(a) of the Social Security Act, 42 U.S.C. §607(a), requires that states provide AFDC-UF benefits to "a needy child . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father." The federal regulation at issue here, however, 45 C.F.R. §233.100 (a)(1), excludes two classes of respondents who are clearly unemployed, namely those out of work by virture of their alleged gross misconduct, voluntarily quitting their jobs, or due to a labor-dispute work stoppage. The district

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courts, in both Francis II and Bethea, correctly held that the Secretary's regulation, in excluding these fathers who are unemployed, conflicted with the plain meaning of 42 U.S.C. §607(a) and was thus invalid.

In Francis I, the district court held invalid the Maryland regulation which conflicted with the H.E.W. regulation, 45 C.F.R. §233.100(a)(1), as then written. The Court said:

> A man out of work because he was discharged for cause by his employer is unemployed. There can be no two ways about that conclusion.

340 F.Supp. at 366 (emphasis in original) (App. 24a). In Francis II, the court applied this simple logic in the context of the federal statute:

> The statute relates to the unemployment of a father--and a father who is discharged for cause by his employer is unemployed.

379 F.Supp. at 81 (emphasis in original) (App. 83a). Similarly, in Bethea, the district court found that "a father who voluntarily quits his job is unemployed within the meaning of 42 U.S.C. §607(a)." 384 F.Supp. at 1281 (App. 96a). It requires no strained statutory interpretation to reach the obvious conclusion that fathers who have either been discharged for cause or who have quit their jobs are not employed. In so holding, the district courts correctly found the Secretary's regulation contrary to the clear command of the Social Security Act. Thus, the Maryland Rule, 200X.A.2. (now MARR 7.02.09 Sec. 10.A.(2)) remains invalid.

B. Because the regulation fails to establish a uniform, federal definition of unemployment, it conflicts with the requirements of 42 U.S.C. §607(a).

While finding that "a person out of work because of a labor dispute does not necessarily fall within the definition of 'unemployed,'" 379 F.Supp. at 81 (App. 83a), the district court in Francis II held that the federal regulation, in failing to prescribe a national definition of "unemployment," conflicted with the intent of the 1968 amendments to the Social Security Act. Thus, with regard to the third class of respondents, namely strikers, the regulation was held invalid.

Under the original 1961 Enactment, Pub. L. 87-31, §407, 75 Stat. 75

(1961), each state which elected to participate in the optional AFDC-UF program was given the freedom to define who was an "unemployed parent." In 1968, Congress amended the statute to achieve uniformity among the varied definitions applied by the states. See H. R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967), quoted in Francis I, 340 F.Supp. at 377 (App. 46a). Under the amendment, "the definition of unemployment would be made by the Federal Government." H. R. Rep. No. 544, 90th Cong., 1st Sess. at 17 (1967), quoted in Francis II, 379 F.Supp. at 82 (App. 85a). That definition was to be "uniform . . . throughout the United States." Report of U.S. Senate Comm. on Finance, Social Security Amendments of 1967 at 4 (Nov. 14, 1967).

The clear import of the legislative history is that Congress desired a uniform set of federal standards within which the states could implement their AFDC-UF programs. The regulation at issue here, as the district court correctly found, "contains no standards whatsoever." 379 F.Supp. at 82 (App. 85a). Instead, the states are given multiple options as to who they may include or exclude within their definitions of unemployed fathers: strikers, those who are disqualified from state unemployment compensation, and those who could be disqualified from unemployment compensation. The differences in unemployment eligibility among the states only increases the likelihood of variability among AFDC-UF programs. This result is directly contrary to the statutory mandate. By issuing a regulation which delegates to the states the broad discretion of defining "unemployment," the Secretary has severely undermined the intent and spirit of the 1968 amendments.

CONCLUSION

Because this case presents no substantial issue, the petition should be denied.

Respectfully submitted,

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